United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To Be Argued By
IRVING B. BUSHLOW

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORIGINAL

75-7053

WILLIAM GARAFOLA,

Plaintiff-Appellee,

-against-

F.A. DETJEN, "SAAR,"

Defendant and Third Party
Plaintiff-Appellee,

-against-

PITTSTON STEVEDORING CORP.,

Third Party Defendant-
Appellant.

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

PLAINTIFF-APPELLEE'S BRIEF

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IRVING B. BUSHLOW
Attorney for Plaintiff-Appellee
WILLIAM GARAFOLA
Office and Post Office Address
26 Court Street
Brooklyn, New York 11201
Telephone: (212) MA 5-1336

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

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PLAINTIFF-APPELLEE'S BRIEF

PRELIMINARY STATEMENT

Plaintiff, a longshoreman employed by Third-Party Defendant, Pittston Stevedoring Corp. (hereafter the stevedore), commenced this action to recover damages for personal injuries sustained on December 20, 1969, while working aboard the S.S. Saar, a vessel owned by the Defendant and Third-Party Plaintiff, F.A. Detjen (hereafter the shipowner). After a trial

before the Hon. Walter Bruchhausen and a jury, plaintiff recovered a verdict of $235,000 against the shipowner (215-216a), who in turn recovered indemnity against the stevedore (216a). The jury rendered a special verdict and found only unseaworthiness and no negligence (215a).

The shipowner moved at the end of plaintiff's case to dismiss for failure to make out a prima facie case (101a). This motion was renewed at the end of the shipowner's proof and in addition, the shipowner moved for a directed verdict (119-120a). The stevedore moved to dismiss the third-party complaint for failure to make out a prima facie case (120a).

At the conclusion of all the proof, the shipowner renewed its previous motions and also moved for a directed verdict against the stevedore (134a). The stevedore moved to dismiss the third-party complaint (134a). All these motions were denied.

After the verdict was rendered, the shipowner renewed all its prior motions, moved for judgment N.O.V. and for a new trial because the verdict was excessive (217a). The stevedore joined in these

motions and renewed its prior motions (217a). The Court denied all these motions (217a).

The stevedore filed an appeal (223-224a) and the shipowner filed a protective cross-appeal.

THE FACTS

Plaintiff customarily worked as an extra labor man on the pier unloading trucks (7a). On the date of his accident, December 20, 1969, he shaped-up at the hiring hall and got a job as a hold-man in a gang and was sent to his regular pier to work in #2 hatch of the vessel (7-8a). One of the maintenance men on the pier, Rocco Missud, also got a job as a hold-man (8-9a) in the same gang. Plaintiff and his gang commenced work in #2 hold at about 8:30 A.M. loading heavy drums into the wings which work continued until 12 Noon (9a). After lunch they returned to the hatch using the vessel's permanent steel ladder (23-24a). The ladders were not blocked at that time (23a). After 1 P.M. they loaded empty containers (25a) and pallets into the same hatch (9a). As the longshoremen loaded cargo in the afternoon,

they put some containers in front of the vessel's permanent ladders and escape hatches and blocked these ladders (58a, 123-124a, 33-34a). As they loaded containers, they covered the floor of the hatch except for a space of 7' x 7' which was left empty (10-11a). A second level of cargo was loaded on top of the containers in certain places and this cargo partly consisted of empty pallets (40a).

At about 4:15 to 4:20 in the afternoon (10a), plaintiff received an order from the acting hatch boss (the gangwayman) (25a) to come up out of the hatch (12a). Plaintiff requested a ladder (12-13a) but none was supplied (30a). In fact, his acting hatch boss replied to the request for a ladder by telling plaintiff to "come on up. We only got another half hour, come on up." (13a) Plaintiff's co-worker, Rocco Missud, testified he received the same order (53-54a), and also requested a ladder, three or four times (53a). He also heard plaintiff request a ladder (53a, 57a).

Plaintiff went to where the empty pallets were stowed and started to climb up on them. In the process, he slipped, lost his balance and fell about

13 feet into the hole left in the stow (13a, 28a, 41a, 86a). In falling, he struck his right leg on some of the pallets on the edge of a container (86a) and also injured his back, elbow and "my brain shook so much I got noises in my ear day and night." (13-14a)

Plaintiff ultimately landed on the steel deck (14a). A fellow longshoreman, Richard Scott, jumped down and using his belt, put a tourniquet on plaintiff's right leg (15a, 87-88a), which was bleeding badly (87a). A doctor was called and when he arrived at the #2 hatch about 15 minutes later, he would not go down in the hatch until a ladder was supplied (122-123a). A portable ladder was obtained and the doctor came into the hatch (88a), and with Scott's assistance splinted the leg, put on a proper tourniquet, and plaintiff was removed from the hatch on a pallet and taken to Long Island College Hospital by ambulance (16a, 89a).

The admitting physician, Dr. Thomas Weiss, examined plaintiff in the emergency room and found a compound comminuted fracture of the right leg (129a). Dr. Weiss described plaintiff's condition:

"Q. A bad leg?
A. Yes.
Q. Pain?
A. Yes.
Q. Real pain?
A. Yes" (129a)

While in the emergency room he was given antibotics to prevent infection and tetanus antitoxin. Dressings were applied to the bone which was protruding through the skin (62a). There also was tenderness and limitation of motion of the right shoulder (64a).

X-rays were taken and they revealed a fracture of the lower end of the right tibia and fibula (62a). Plaintiff was prepared for surgery and an open reduction was performed; the fracture site was opened up and the fragments of bone were placed together and two screws were used to join the bony fragments together (64a).

Because a lot of skin was pulled off the leg in the accident, a second incision was made and a flap of skin was used to cover the gap. Skin was then taken from the thigh and grafted on the second incision site (64-65a).

A cast was applied from the toes to the thigh (61a) and after the operation plaintiff was

unable to urinate and had to be catherized (65a).

Subsequent x-rays revealed that the fragments of bone had slipped and there was an unstable fracture. Another closed reduction operation was performed and they attempted to re-position the bone fragments but were unable to do so. Some of the healing process which had already occurred was disturbed by the manipulation (65a).

Four months later, on April 19, 1970, the skin had not yet healed on the site of the incision and also on the donor site on the thigh where the skin had been taken from. The cast was removed on April 20 and on April 22 further x-rays showed the fracture had not yet healed so further surgery was cancelled since they did not want to operate through unhealed or infected skin (66a).

Instead plaintiff was started on physiotherapy and a short cast from the knee to the toes was applied. He was started on crutch walking and exercise (66a). At that time he also complained of buzzing in his left ear since the accident and tests indicated a hearing loss in both ears (67a).

At the time of his discharge from the hospital on May 9, 1970, the diagnosis was as follows:

> "Compound fracture of the distal right tibia and fibula, evulsion of the skin of the right distal fibula, contusion of the right shoulder, postoperative...urinary retention...tinnitus of the left ear, which means buzzing..." (67a)

During his further treatment, x-rays revealed that the fracture had healed but that there was progressive post-traumatic arthritis of the ankle joint (69a). One of the consulting physicians, Dr. Joseph Silver, indicated plaintiff might eventually require a fusion operation of the ankle, which would have limited motion but helped to eliminate pain (68a).

Following his discharge from the hospital plaintiff was in a wheelchair and used his crutches part of the time, for about 7-8 months. He had to use both crutches for about a year and one crutch for another year and a half (18a). He continued to use a cane up to the time of trial (20a).

Plaintiff complained of pain every day in his right leg and at the time of trial still had buzzing in his ear and he was unable to straighten out his right elbow (20a) and had pain in his neck and

shoulder (21a).

Plaintiff was examined by Dr. Philip A. Barenfeld on November 19, 1973 (59a) shortly before trial. Dr. Barenfeld testified at trial that as of November 19, 1973, plaintiff complained of considerable pain and swelling in his right ankle with limitation of motion in the ankle. He had pain and limitation of motion in his right elbow, pain in his neck (61a) and buzzing in his ears, especially the left ear. Plaintiff required pain killers frequently to relieve the pain and needed sleeping pills to sleep at night (62a).

Dr. Barenfeld's examination revealed the patient had a marked right sided limp, was using a cane and had a healed scar on the front of his thigh, the donor site, and a 4 1/2" scar on the front and side of the right ankle where the operative incision was made (69a).

There was considerable deformity over the lower ends of his right tibia and fibula. Motion of his ankle in an up and down and side direction was markedly restricted. There was tenderness on

the lower end of the tibia and fibula. There was atrophy of 1 1/2" of the right calf (70a).

X-rays showed a badly united fracture of the tibia and fibula (71-73a), post traumatic arthritis (73a) and spurring of the ankle joint which prevented extension of the foot (73-74a).

Dr. Barenfeld's diagnosis was a badly united compound fracture of the distal right tibia and fibula with post traumatic arthritis of the ankle joint (75a). It was his opinion that the restriction, limitation of motion and pain were caused by the accident and were permanent in nature (75a) and that the buzzing and loss of hearing was caused by the accident and was permanent (76a).

Dr. Barenfeld had treated men over 65 who were working and some were working until age 70 (78-79a).

There was essentially no other medical proof at trial although the stevedore called Dr. Thomas Weiss, the treating physician and Dr. Joseph Silver, an orthopedic consultant. Both doctors were questioned by the stevedore solely as to what history plaintiff had given them. They were not questioned

as to their treatment or diagnosis.

In addition to plaintiff, proof was obtained from three other witnesses as to the facts and circumstances of the accident. The witness Scott testified that he was standing on the deck and saw plaintiff climbing up the pallets. He also saw plaintiff slip and fall backwards into the hold (86a). He jumped down to help him and found plaintiff.

> "He was lying in that space there with his arm under him and his foot was almost off.
> Q. Bleeding?
> A. Yes, he was bleeding very badly." (87a)

As Scott helped the doctor put on the splint, he turned plaintiff's right foot and found grease on the sole of plaintiff's right shoe (89a, 94-97a). He also testified that pallets carry grease and lube oil and that it was not unusual to find grease or tallow on pallets (92a). Plaintiff agreed that sometimes there is grease and dirt on pallets (29a).

The witness, Rocco Missud, was standing in the hatch waiting for plaintiff to climb up the pallets (55a). He saw him fall and saw plaintiff in the hold with his leg broken (56a). Missud also testified that the acting hatchboss (the gangwayman),

told them to climb out of the hatch by climbing the pallets (57a).

Cosmo Panacio, the ship's stevedore foreman, testified pursuant to subpoena that he had told the acting hatchboss, John Smith, at about 4 P.M. to get a portable ladder for #2 hatch (121a). After being informed of the accident, Panacio came to the hatch and when he found out there was still no portable ladder there, "...I blew my top again." (122a)

Panacio also testified that there should have been a portable ladder at the #2 hatch all day (123a), that it was customary to have a portable ladder available (124a), and that it was the hatch boss' responsibility to supply a ladder (124a).

POINT I

THE STEVEDORE'S MOTION FOR JUDGMENT N.O.V. WAS PROPERLY DENIED.

A. The stevedore's failure to move for a directed verdict against plaintiff during trial, precludes it from questioning the sufficiency of the evidence to support a verdict in favor of plaintiff by a motion for judgment N.O.V. or to raise the question on appeal.

Rule 50(b) of the Federal Rules of Civil

Procedure states in part:

> "Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; ... "

This rule has been interpreted to mean exactly what it says: that..."a motion for judgment n.o.v. may be entertained only if the movant has made a motion for a directed verdict at the close of all the evidence." 5A, Moore's Federal Practice, 2nd Ed. 1974, sec. 50.08, p. 2357. *Starling v. Gulf Life Ins. Co.*, 382 F.2d 701, 703 (5 Cir. 1967); *Transworld Airlines, Inc. v. Shirley*, 295 F.2d 678 (9 Cir. 1961); *Massaro v. United States Lines Company*, 307 F.2d 299, 303 (3 Cir. 1962).

The stevedore also raises the issue on this appeal as to whether there was sufficient evidence to support the verdict. The foregoing cases also support the general rule that the stevedore's failure to move for a directed verdict against plaintiff's evidence precludes it from challenging the sufficiency of the evidence on appeal. This Court follows the prevailing

view as stated in *Parenzan v. Iino Kaiun Kabushiki Kaisya*, 251 F.2d 928 (2 Cir. 1958), cert. den. 356, U.S. 939 (1958) at p. 930:

> "On this appeal the third-party defendant raises three issues: (1) that there was no substantial evidence of notice of the improper stowage; (2) that the third-party defendant was not shown to be actively negligent; and (3) that the shipowner must be considered *in pari delicto* with the stevedoring firm and thus barred from recovery.
>
> First, since the third-party defendant did not move for a directed verdict, the sufficiency of the evidence of notice is not properly before us, and we need not pass on it. See Rotondo v. Isthmian Steamship Co., 2 Cir., 1957, 243 F.2d 581 and the cases cited therein."

In its brief, the stevedore does not claim that its attorney moved for a directed verdict against the plaintiff. Instead, it apparently seeks to take advantage of the defendant's motion for a directed verdict against plaintiff. If this is what the stevedore intends, the Courts have ruled that one party may not rely on another's party's motion for a directed verdict.

In *Deakyne v. Commissioners of Lewes*, 44

F.R.D. 425, 426, rev'd on other grounds 416 F.2d 290 (3 Cir. 1969), where one defendant moved for a directed verdict and no similar motion was made by either of the other defendants, the Court held that the other defendants had no standing to move for judgment N.O.V.

Where the issues on the principal action and on a counter-claim were different, a motion by plaintiff for a directed verdict on the counter-claim would not support a motion for judgment N.O.V. on the principal action if no motion was made for a directed verdict on that claim. *Continental Air Lines Inc. v. Wagner-Morehouse, Inc.*, 401 F.2d 23, 25-26 (7 Cir. 1968).

In order for this Court to decide whether the stevedore properly moved for a directed verdict, the following is a list of all the motions made by *all* the parties.

After plaintiff rested, a motion was made by the shipowner to dismiss the complaint for failure to make out a prima facie case (101a). The motion was denied (104a). The stevedore's attorney made no motion at this time and did not join in the shipowner's motion.

After the shipowner rested, its attorney renewed its motion to dismiss the complaint for failure to make out a prima facie case and also moved for a directed verdict (119-120a). These motions were denied (120a).

At this point, the plaintiff moved for a directed verdict against the shipowner, which motion was denied (120a).

The attorney for the stevedore then moved *solely* to dismiss the third party complaint for failure to make out a prima facie case. This motion was also denied (120a).

After all the parties rested, the plaintiff again moved for a directed verdict (130-132a). His motion was again denied (134a).

The shipowner's attorney renewed its motions previously made and further moved for a directed verdict against the stevedore. These motions were denied (134a).

The stevedore then moved to dismiss the third-party complaint and its motion was denied (134a).

After the verdict was rendered the shipowner's attorney renewed all its previous motions and moved for

judgment N.O.V. or in the alternative for a new trial and on the ground that the verdict was excessive. The motions were denied (217a).

The stevedore's attorney then moved as follows: "I join those motions, renew all my motions and all motions available to me under the Federal Rules of Civil Practice and Procedure." The Court denied these motions (217a).

A review of the preceeding motions clearly shows that the stevedore never made any motions against the plaintiff's complaint or the plaintiff's proof during the trial. It never made a motion for a directed verdict *against* the plaintiff and never joined in the motions made by the shipowner in that regard. After the verdict was rendered, the stevedore joined in with the shipowner's motions for judgment N.O.V., for a new trial and because the verdict was excessive. It also renewed its own previous motions.

Having failed to move for a directed verdict against the plaintiff, the stevedore cannot now raise the issue that its motion for judgment

N.O.V. was improperly denied and it cannot now challenge the sufficiency of the evidence.

B. Assuming arguendo that appellant can question the sufficiency of the evidence on this appeal, the evidence clearly was sufficient to sustain the verdict.

In Point I of its brief and in its statement as to the proof, the stevedore-appellant discusses the proof as if there was only one claim by plaintiff as to the vessel's unseaworthiness. This was not the case.

Plaintiff, in his proof and in summation, presented four separate claims as to the cause of the accident: (1) the lack of a portable ladder so the longshoremen could safely exit from the hatch, (2) creating a hole in the stow and not filling it up with other cargo or empty pallets, (3) the lack of a safety net around the edge of the hole in the stow to prevent the longshoremen from falling in the hole, and (4) grease on the pallet which plaintiff was climbing, which grease caused him to slip and fall.

Although to some degree the proof on the first three issues was disputed, there was no proof to contravert the claim of grease. On this issue

alone there was sufficient proof to sustain the verdict.

Plaintiff testified that as he was climbing the pallets to get out of the hatch, he stepped on something, slipped, lost his balance and fell (13a, 28a, 41a). He did not know what he slipped on (41-42a), which is not remarkable since he fell some 13 feet, suffered a compound fracture of his right tibia and fibula and in this condition could hardly have gone back and checked to see what he slipped on. He was aware that pallets sometimes have grease and dirt on them (29a).

However, the witness Richard Scott, testified on cross-examination by the shipowner's attorney that pallets carry grease and lube oil and that it is not unusual to find grease or tallow on pallets (92a). Scott also found grease on the sole of plaintiff's right shoe as he was helping the doctor put a splint on plaintiff's right leg (89a, 94-97a), as plaintiff lay in the hatch where he had fallen.

Surely the above proof was sufficient to allow this issue to be presented to a jury and was sufficient to sustain a verdict. Proof as to what

a claimant slipped on need not come from the claimant. See *Milin v. United States Lines*, 31 N.Y.2d 336, 339-340 (1972), where an eye-witness testified he saw the plaintiff fall and later saw grease on the sole of plaintiff's shoe and on the cargo where plaintiff had been walking. This proof was held sufficient to make out a prima facie case absent any testimony by the plaintiff.

The jury herein could have believed plaintiff fell due to the presence of grease and consequently there are no grounds for questioning the sufficiency of the evidence. Furthermore, since the special verdict did not ask specific questions as to each claim of unseaworthiness, the general verdict on unseaworthiness should be upheld where there is substantial evidence to support any of the theories advanced. *Vareltzis v. Luckenbach Steamship Company*, 258 F.2d 78, 80 (2 Cir. 1958).

As to the other claims, the proof was undisputed that at the time of the accident the regular access ladders had been blocked by cargo loaded by the stevedores and that there were no portable ladders supplied for the longshoremen to use to come out of

the hatch. The proof was also overwhelming that plaintiff and his co-workers requested a portable ladder and none was supplied although one was produced after the accident so that the doctor could descend into the hatch (88a). On the basis of the above proof, plaintiff proved a case of unseaworthiness. In a similar fact pattern involving absence of a ship's ladder so that a longshore foreman was injured going from tiered cargo to the deck, the Court of Appeals found sufficient evidence to warrant the verdict. *Stein v. Sea-Land Services, Inc.*, 440 F.2d 1181 (5 Cir. 1971).

There was also proof that as the longshoremen loaded cargo they left a large hole in the stow, about 7' x 7' and that no safety net was rigged around the edge of this hole (87a) as the longshoremen proceeded to load cargo on the level above the hole. Plaintiff ultimately fell into this hole. The negligent failure to fill this hole with cargo and the failure to rig a safety net both were a basis for a finding of unseaworthiness.

Appellant cites various cases in Point I of its brief in support of its argument that there

was no unseaworthiness. They are either not applicable, such as *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971), or are clearly distinguishable.

Guarracino v. Luckenbach S. S. Co., 333 F.2d 646 (2 Cir. 1964) involved a longshoreman who was told to wait while a portable ladder was sent for. In addition, the vessel's fixed ladder was accessible. Instead of waiting for the portable ladder, or walking to the fixed ladder, plaintiff tried to climb out of the hatch on some cartons and fell injuring himself. The Court held that the vessel had breached no duty to plaintiff since it provided both a fixed and a portable ladder. In the instant case the fixed ladders were blocked and the vessel provided no portable ladder, although one was requested.

Pisano v. S. S. Benny Skou, 346 F.2d 993 (2 Cir. 1965) involved an accident caused entirely by plaintiff's contributory negligence; his failure to put a knot in a preventer guy. It should be noted that the jury herein, found plaintiff free from contributory negligence, so that the instant case is not related to an accident caused solely by plaintiff's own negligence.

In *Caputo v. Kheel*, 291 F.Supp. 804 (SDNY 1968), the plaintiff was injured climbing on top of some heavy machinery to release a bridle. Portable ladders were available to use to get on top of the heavy machinery and the Court held plaintiff's failure to utilize the ladders was the cause of his accident.

Virgona v. Farrell Lines Incorporated, 366 F.Supp. 713 (SDNY 1973) involved an accident caused by a single act of negligence of a fellow longshoreman and the Court found no liability based on *Usner*, supra. This action does not involve an *Usner* situation.

Having failed to move for a directed verdict, the stevedore's motion for judgment N.O.V. was properly denied and consequently the stevedore cannot question the sufficiency of the evidence on appeal, which evidence, in any event, was more than sufficient to sustain the jury's findings.

POINT II

THE SAFETY AND HEALTH REGULATIONS FOR LONGSHORING WERE PROPERLY USED WITHOUT OBJECTION BY ANY PARTY.

At the end of plaintiff's case, his attorney read the jury those portions of The Safety and Health Regulations which applied to ladders and safety nets (99-100a). Although the stevedore's attorney objected to their being read to the jury, he objected on the ground that these regulations belonged in the Court's charge (98-99a).

The shipowner did not object to the reading of these Regulations and when the shipowner's attorney requested the Court to charge various sections of the Regulations (137a), there was no exception by the stevedore to this request.

In its charge, the Court mentioned the Regulations (192-195a) only in that part of its charge regarding the indemnity action. The Court never charged that the Regulations applied to the shipowner or that they applied to the plaintiff's case against the shipowner. The Court read from the Regulations that compliance with the Regulations was the

responsibility of the employer and then read the definitions of an employer and employee which definitions excluded the employees of the vessel (192-193a).

After the principal charge, the Court considered exceptions and further requests (201-205a) and neither the shipowner nor the stevedore raised any exception or objection to the charge concerning the Safety Regulations.

Rule 51 of the Federal Rules of Civil Procedure states that:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The failure of the stevedore to object to the proposed charge or to the actual charge in regard to the Safety Regulations precludes it from raising the issue on appeal. *Bolan v. Lehigh Valley R. Co.*, 167 F.2d 934, 937 (2 Cir. 1948); *Cohen v. Franchard Corporation*, 478 F.2d 115, 122 (2 Cir. 1973) cert. den. 414 U.S. 857 (1973).

Reading the charge in its entirety, and not just the section referred to by the stevedore, will indicate that the Court properly charged the applicable law and that the charge directed the jury to consider only the law as set forth in the charge (183a) and that the Court charged that the Safety and Health Regulations were applicable only in considering the indemnity action (191-195a). If there was any confusion, the stevedore's failure to except to this part of the charge so that the confusion could be clarified, precludes it from raising the issue on appeal.

Besides, as this Court said in *Rosenfeld v. Curtis Pub. Co.*, 163 F.2d 660 (2 Cir. 1947) at p. 662:

> "A charge must be considered as a whole from the point of view of the impression it seems to convey to a jury of laymen."

The charge herein viewed from that perspective was clearly proper and was not confusing or subject to any misunderstanding by the jury.

The stevedore-appellant relies on *Albanese v. N. V. Nederl Amerik. Stoomv. Maats*, 346 F.2d 481 (2 Cir. 1965), rev'd on other grounds, 382 U.S. 283

(1966) and *Bernadini v. Rederi AIB Saturnus*, ___F.2d ___ (2 Cir. 1975) Docket No. 74-1404, decision of March 11, 1975. Both are clearly distinguishable on a number of grounds: first, in both the above cited cases the trial court charged that the Safety and Health Regulations could be considered as a standard in the action between the plaintiff and the shipowner. In this action, the Court charged that these Regulations applied only to the indemnity action. Second, in both *Albanese* and *Bernadini*, the shipowner's attorneys objected to the Court's charge that the Regulations were applicable to the main action. In this case, the shipowner never objected to the reading of the Regulations by the plaintiff's attorney and did not object to the Court's reference to the Regulations in the charge. Also, in this case, the stevedore's attorney did not properly object to the use of these Regulations and cannot now raise the issue on appeal. Third, the Supreme Court of the United States in its decision in *Albanese*, 382 U.S. at p. 284 interpreted this Court's opinion as follows:

> "In its opinion the Court of Appeals also stated that the District Court

> incorrectly instructed the jury as to the applicability of the Safety and Health Regulations for Longshoring on the question of the shipowner's liability. But we do not read that Court's opinion as making this an independent ground for ordering a new trial. So we not only reverse the judgment of the Court of Appeals in the case of Albanese but reinstate the District Court's judgment in his favor."

Consequently, assuming the improper use of the Safety and Health Regulations, this would not be an independent ground for reversal as urged by appellant.

The Court's charge as to the Safety and Health Regulations was proper and was not objected to and consequently there was no reversible error in this regard.

POINT III

THE VERDICT WAS NOT EXCESSIVE.

Plaintiff's uncontroverted proof at the trial included testimony as to the nature and extent of his injury; the subsequent period of medical treatment and disability; a permanent almost complete

restriction of motion in his ankle; past, present and future pain and sufferi[illegible]nd past and future lost wages. The jury returned a verdict in plaintiff's favor in the amount of $235,000 and the shipowner and stevedore moved for judgment N.O.V. or for a new trial because the damages were excessive. The trial judge denied these motions (217a).

Plaintiff contends that the verdict "...was clearly within the maximum limit of a reasonable range within which the jury may properly operate." *Taylor v. Washington Terminal Company*, 409 F.2d 145, 149 (CA DC 1969).

The stevedore-appellant argues herein that the verdict should be reduced by $100,000. The stevedore is arguing that this Court should consider the evidence in the light most favorable to the stevedore and not in the light most favorable to the plaintiff. The jury obviously believed all, or most of, plaintiff's proof and the jury could hardly have done otherwise since most of the proof, especially as to damages, was uncontradicted. The stevedore argues that this Court should reduce the verdict so that it would fall within the minimum range of what the

jury could have considered, instead of considering whether the verdict fell within the maximum limit of a reasonable range, as the cases require. *Taylor*, supra.

What are the factors to be applied by this Court in reviewing a damage award for excessiveness? In *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2 Cir. 1961) this Court set forth some of the factors to be followed:

> "If we reverse (the trial judge) it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded (Delaney v. NY Cent. R. Co., DC SDNY 1946, 68 FS 70; Lopoczyk v. Chester A. Poling, Inc., DC SDNY, 60 F.Supp. 839 aff'd 2 Cir. 1945, 152 F2d 457,) so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge...."

Other criteria also considered by this and other Courts include:

> "*LaFrance v. NYNH & H RR Co.*, 292 F2d 649, 650 (2nd Cir. 1961) (verdict will not be modified unless 'fantastic'); *Wooley v. Great Atl. & Pac. Tea Co.*, 281 F2d 78, 80 (3rd Cir. 1960) (Verdict not to be disturbed unless 'so grossly excessive as to shock the judicial conscience' so that it would be a 'manifest abuse of discretion' not to order a new trial)..." *Caskey v. Village of Wayland*, 375 F.2d 1004, 1007 (2 Cir. 1967).

Also,

> "The evidence and inferences reasonably deducible therefrom must be viewed in the light most favorable to the prevailing party, and the Court must assume that the jury followed the Court's instructions." *Pelham v. Hendricks*, 132 F.Supp. 774, 775 (M.D. Pa. 1955).

In reviewing the evidence in a light most favorable to the plaintiff, this Court must assume that the jury resolved every disputed issue of damages in plaintiff's favor in a manner logically consistent with their verdict and drew inferences from that evidence in plaintiff's favor. *Chambers v. Tobin*, 118 F.Supp. 555, 559 (D.C. 1954); *Calvey v. United States*, 27 F.Supp. 359, 360 (M.D. Pa. 1939). This is more true in this action because most of plaintiff's proof on damages was uncontradicted.

An examination of the various items of damages proven by plaintiff along with the reasonable

inferences fairly drawn from these facts will show the following:

Medical expenses to the date of trial were stipulated to be $16,000 (5a).

Plaintiff testified that for the two year period before his accident, he earned $11,000 per year (21-22a). Plaintiff was injured on December 20, 1969. The trial took place on December 4, 5, 6 and 7, 1973. Plaintiff testified he had not returned to work since his accident (21a).

Loss of earnings from the date of accident to the trial would consist of four years at $11,000 per year, or $44,000.

Plaintiff claimed future loss of earnings and the Court charged the jury without exception, that they could consider a claim for future lost earnings (189-190a). Dr. Barenfeld testified that some men were still working at age 70 and that he did not know if plaintiff would still be working but for the accident (78-79a). Plaintiff was nearly 68 at the time of trial and his attorney argued to the jury that plaintiff would have worked 3-5 years in the future, but for the accident (181a). Plaintiff was

an unusually active man who was still jogging at age 63, before his accident (50a). The jury could have credited this proof and decided plaintiff would still be working at age 73. They saw plaintiff and were able to make an assessment of him and his credibility and in viewing the evidence this Court has to assume the jury viewed the evidence and determined this issue in a manner most favorable to plaintiff and consistent with their verdict.

Consequently, considering that the jury awarded five years future lost earnings, this would be 5 years at $11,000 per year or $55,000, discounted to present value would be about $35,000. Totalling the figures to this point: $16,000 medical, $44,000 lost wages to the trial and $35,000 in future lost wages would amount to $95,000.

This would indicate that the jury awarded plaintiff about $140,000 in past, present and future pain and suffering. A review of the proof as set forth in the Facts (pages 3-12 of this brief) shows sufficient proof to support an award for $140,000 in pain and suffering.

Plaintiff fell backwards 13 feet, and on the way struck the edge of a container (86a). He landed on his back on a steel deck (14a) and was not unconscious. He had a compound fracture of both bones of his lower right leg and one of the bones was sticking through the skin (129a). He was bleeding very badly until a co-worker put a tourniquet (15a, 87-88a). He lay there conscious for at least 15 minutes until the doctor arrived and he must have suffered a great deal of pain and anxiety during that time. When he arrived in the emergency room, the admitting doctor admitted he was in "real pain" (129a). There is no evidence that he was given any pain killer up to that point.

Plaintiff underwent two operations which included taking skin from another part of his leg (64-65a). He was in a cast up to his thigh (61a) for four months and a lesser cast for many months. He was in the hospital for five months.

Plaintiff had to use a wheelchair most of the time for 7-8 months after leaving the hospital. He had a further period of one year on two crutches and 1 1/2 years on one crutch (18a). He needed a

cane to walk all the time up to and including the trial, four years after his accident (20a).

Plaintiff had pain every day in his right leg and had buzzing and a hearing loss in his ears, especially the left ear. Dr. Barenfeld found these conditions to be related to the accident and the injury and said they would be permanent (75-76a). Plaintiff frequently needed pain pills and sleeping pills at night (62a).

Dr. Barenfeld related the pain in the right leg and ankle to a badly united fracture of the tibia and fibula, traumatic arthritis and spurring in the ankle joint (70-74a).

The jury obviously credited the sole testimony on these points and considered that plaintiff would have pain every day, most of the time, sufficient to need pain killers and sleeping pills and that he would be compelled to limp around on a cane the rest of his life. They considered the pain and anxiety he initially went through and the pain and suffering of the operations. Added to the pain was the permanent condition of a buzzing in his ear which all by itself could be disabling and very bothersome.

In addition there was a hearing loss.

Considering that added to the previously discussed injuries plaintiff claims he also injured his right shoulder and right elbow. The witness, Scott, testified when he arrived in the hatch, plaintiff was lying with his arm under him (87a). Upon arrival at the hospital, plaintiff had tenderness and limitation of motion in his right shoulder (64a). He complained of pain continually up to the time of trial. Although Dr. Barenfeld didn't think the condition of his right shoulder was related, the jury could have decided otherwise and awarded plaintiff a sum for pain and suffering for the right shoulder.

On the basis of this analysis, the jury could easily have awarded plaintiff $140,000 for past, present and future pain and suffering and disfigurement and this Court has considered cases in which comparable sums were awarded.

In *Grunenthal v. Long Island Railroad Company*, 292 F.Supp. 813 (SDNY 1967), remanded for new trial or remittitur, 388 F.2d 480, rev'd and judgment for pltf. aff'd 393 U.S. 156 (1968), the

jury awarded $150,000 for pain and suffering to a 45-year-old railroad worker for a compound fracture of the instep, the great toe and the second metatarsal which prevented him from placing any weight on the inner portion of his right foot. In denying defendant's motion for a new trial, Judge Cooper commented in 292 F.Supp. at p. 816:

> "...Reasonable and controlled reaction to pain and suffering varies with man's innate, sensitive response to the woes and laments of those stricken and bereaved--especially where clearly unearned or cruelly inflicted.
>
> Who is to say this jury was not so composed. If the jury believed such an award fair and proper, we find nothing untoward, inordinate, unreasonable or outrageous--nothing indicative of a runaway jury or one that lost its head--in its reflected resolution to so respond."

Judge Cooper also commented on the total absence of exaggeration in the plaintiff's testimony concerning pain and suffering, a comment which would aptly apply to the testimony of this plaintiff.

The award of $140,000 for pain and suffering in this action should not shock the conscience of this Court after having affirmed an award of $168,000 for pain and suffering for 168 weeks in *La Capria v. Compagnie Maritime Belge*, 427 F.2d 244 (2 Cir. 1970).

The stevedore-appellant also argues that "...the passion and emotion displayed and mentioned by plaintiff's attorney in his summation..." was the cause of the allegedly excessive verdict. At no time during the summation of plaintiff's attorney or thereafter did the attorney for the stevedore object to any remark concerning damages made in summation by plaintiff's attorney, consequently he cannot raise the issue on appeal. See *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245, 1248 (3 Cir. 1971), cert. den. 404 U.S. 883 (1971). A timely objection would have given the trial judge an opportunity to correct any prejudicial remarks, if any were made.

Appellant also cites various cases in which other courts and other juries have awarded various sums of money over the past twenty-five years. The best response to this type of argument is Judge Weinfeld's comment in *Dagnello v. Long Island R.R. Co.*, 193 F.Supp. 552, 554, aff'd 289 F.2d 797 (2 Cir. 1961):

> "No useful purpose would be served in collating the various cases, except to emphasize the contrariety of individual views."

The verdict on damages was not excessive and should be affirmed.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT APPEALED FROM HEREIN SHOULD BE IN ALL RESPECTS AFFIRMED.

Respectfully submitted,

IRVING B. BUSHLOW
Attorney for Plaintiff-
Appellee WILLIAM GARAFOLA

SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED: May 8, 1975

Alexander, Ash, Schwartz & Cohen

Attorneys for Third Party Defendant-Appellant

SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED: 5/8/75

Steven Buchsbaum

Attorney for

UNITED STATES